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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1746

JOHN B. KILROY, SR.,

Petitioner,

vs.

DOUGLAS M. COSTLE, *et al.*,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Statement.

This action was brought by petitioner John B. Kilroy, Sr., the Pacific Legal Foundation and others in an attempt to preclude enforcement of the conditions of National Pollutant Discharge Elimination System Permit (NPDES Permit) No. CA-0109991 until the preparation of an environmental impact statement (EIS) was complete. The action alleges no improper action by the State of California, and the State of California is a party to this suit only because, pursuant to the California Water Code, sections 13000, *et seq.* (Porter-Cologne Act), it issued Waste Discharge Requirement Order No. 74-329 simultaneously with the Environmental Protection Agency's (EPA) issuance of the NPDES permit. Both the Order and the Permit apply to the same discharges and their issuance represented a cooperative

effort between the state and federal governments to regulate the discharges of waste water to the Pacific Ocean by the City of Los Angeles through its Hyperion Waste Water Treatment Plant. The State of California has a vital interest, therefore, in the outcome of this matter and has consistently supported the position of the United States Government in this case. The brief of the United States is not due in this matter for another twenty days, but the state respondents anticipate being able to support its position again.

The Petition for a Writ of Certiorari Should Be Denied.

No special or important reasons as to why this Honorable Court should grant a writ of certiorari have been presented by the petitioner as required by Rule 19. The order which petitioner asks this Court to review was merely a denial of a request for a preliminary injunction by the District Court. Petitioner has not shown how he would be injured by this denial. The District Court, affirmed by the United States Court of Appeals for the Ninth Circuit, correctly held that the schedule of compliance for an interim sludge disposal system was a condition of the NPDES permit of the City of Los Angeles and therefore was exempt from the EIS requirements of the National Environmental Protection Act (NEPA) pursuant to Title 33, United States Code, section 1371. That section provides that except for permits for new sources (a situation not applicable here) and except for federal financial assistance for the purpose of assisting the construction of publicly owned treatment works, all actions by the Administrator of the EPA pursuant to the Clean Water Act are exempt from the EIS requirements of NEPA. Here, the EPA agreed to prepare an EIS prior to any funding for the interim sludge program but refused to cease requiring that the City of Los Angeles meet the schedule set forth in

the permit during preparation of the EIS. The City had decided how it would meet the permit conditions. This decision was not made by the EPA or the State. Therefore, the only state or federal action involved was the issuance of permit requirements which are clearly exempted from NEPA's EIS mandate.

Again it is noted that this was merely an order refusing to grant a preliminary injunction to stop the EPA from enforcing the compliance schedule for the interim sludge disposal project which is being challenged here. As Petitioner, in footnote 4, page 14 of his Petition for Writ of Certiorari states, the very project which Petitioner is complaining about is not now the preferred system by which the City of Los Angeles intends to meet the permit conditions requiring the cessation of all discharge of sludge to the Pacific Ocean. The interim dewatering and trucking project has never been put into effect. Therefore, there is no trucking taking place pursuant to that project. The interim project is not included in the terms of the negotiated Consent Decree in a related case, *United States v. City of Los Angeles*, No. CV77-3047-HP (C.D.Cal.) (as of this date, the Consent Decree has been signed by all parties and lodged with the District Court but has not yet been entered). The Consent Decree envisions solving the sludge problem by an entirely new project called the Hyperion Energy Recovery System. This system will be a final solution and no interim program is contemplated.

In the future there is, of course, always the remote possibility that the preferred system will not work and another one will become necessary. However, there is absolutely no indication that the City would return to the project here opposed by Petitioner. Any harm to the Petitioner is indeed extremely unlikely.

Conclusion.

Petitioner has presented no valid reason to this Court to justify this Honorable Court's granting of the Petition. Therefore, it is respectfully submitted that this Honorable Court should not review this cause.

Respectfully submitted,

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